[2023] JMSC. Civ 30

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2022CV03843

BETWEEN	**MICHAEL BONINI**	**FIRST CLAIMANT**
AND	**FRANCESCO BONINI**	**SECOND CLAIMANT**
AND	**PIETRO FANTAPPIE**	**FIRST DEFENDANT**
AND	**ANTONIO FANTAPPIE**	**SECOND DEFENDANT**
AND	**SEBASTIAN KOSMAS**	**THIRD DEFENDANT**
AND	**JASON KOSMAS**	**FOURTH DEFENDANT**
AND	**TIERNEY BONINI**	**FIFTH DEFENDANT**
AND	**ISABELLA NEUBERGER**	**SIXTH DEFENDANT**

IN CHAMBERS (VIA ZOOM)

Ms. Judith M. Clarke and Ms. Jamila Thomas instructed by Judith M. Clarke & Co., Attorneys-at-law appearing for the First and Second Claimants.

Ms. Georgia Hamilton, Ms. Ashley Clarke, Ms. Justine Collins and Mr. Donovan Walker instructed by Georgia Hamilton & Co., Attorneys-at-law appearing for the First and Second Defendants.

Injunction – Granted without notice – Whether there was material non-disclosure – Whether injunction to be discharged for failure to give notice of hearing- Clean Hands- Rule 11.16(3) Civil Procedure Rules.

Heard: January 25, 2023 and February 27, 2023.

PETTIGREW-COLLINS J

BACKGROUND

[1] The property which is the subject matter of this application is known as Lime Tree Villa situate at Hermosa Beach, Ocho Rios in St. Ann and is registered at Volume 933 Folio 16 of the Register Book of Titles. The property was devised to the claimants, first, second, third, fourth, fifth and sixth defendants by their grandmother Maureen Skelly Bonini under her last will and testament, and the property was transferred into all the parties' names under the terms of said Will on May 30, 2022.

[2] The property is currently leased to Alexandra Chong and Jack Brockway. A rental agreement was executed and the tenants were let into possession of the property in July 2020. It is the evidence that as at the time of the filing of the Ex Parte Notice of Application for Interim Injunction on December 1, 2022, the tenants owed rent for a period in excess of twenty-one (21) months while remaining at the property and claiming that the property is in a state of disrepair. The claimants have initiated court proceedings to recover the arrears of rent, to recover possession of the property and for other breaches of their tenants' obligations. The tenants have expressed their desire to purchase the property.

[3] The first and second claimants wish to purchase the first and second defendants' interest in the property and have been in discussions and negotiations to do same. The first and second defendants have also received an offer from one of the current tenants, to purchase the first and second defendants' interest in the property.

[4] On December 1, 2022, the claimants filed a Fixed Date Claim Form supported by affidavit, as well as, an Urgent Ex Parte Notice of Application for Interim Injunction to prevent the sale of the property to the tenants. An Amended Fixed Date Claim form was also filed on December 15, 2022.

[5] Among the orders sought in the Amended Fixed Date Claim Form filed December 15, 2022 are:

(1) "That there be a sale of the properties known as Lime Tree Villa, situate at Hermosa Beach, Ocho Rios in the parish of St. Ann and registered at Volume 933 Folio 16 of the Register Book of Titles pursuant to a valuation obtained from a valuator mutually agreed upon by the parties within thirty (30) days of the date of the orders herein or at such price as shall be agreed upon by the parties.

(2) That the claimants or either of them shall be given the first option to purchase the defendants' shares or the shares of any of the defendant(s) in the subject property and shall exercise said option within ninety (90) days of the date of being notified of the valuation.

(3) Should the claimants or either of them fail to purchase the defendants' shares in accordance with paragraph 1 hereof within the time stipulated in the foregoing paragraph, the Defendants or any number of them shall be next entitled to the option to purchase said shares and shall exercise said option within sixty (60) days of expiry of the time permitted to the claimants under the forgoing paragraph and the claimants are is at liberty to join with any one or more of the defendants to purchase the shares of any other defendant.

(4) In the event that neither the Claimants nor any of the Defendants exercise the options pursuant to the foregoing paragraphs, the property shall be sold on the open market or by private treaty or at public auction pursuant to the valuation obtained herein or at a price mutually agreed upon the parties and the net proceeds divided in accordance with the entitlement of the parties.

The claim is made pursuant to the provisions of the Partition Act."

[6] The injunction was heard ex parte on the date of filing and orders were granted by the Honourable Miss Justice A. Nembhard. The orders remained in force until

December 19, 2022. On that day, the orders were extended until January 25, 2023, the date of the inter partes hearing.

THE APPLICATIONS

[7] The present applications concern the first and second claimants and the first and second Defendants. The third, fourth, fifth and sixth defendants were added as parties because they also hold a share in the property, but they are not involved in these applications. Reference to the claimants or to the defendants unless otherwise specifically indicated, will in this matter be in reference to the first and second claimants and to the first and second defendants. Where there is need to refer to any of the other defendants not involved in this application, that party will be identified.

[8] The matters for consideration presently before the court are:

1) The inter partes hearing of the urgent ex parte application for injunction filed December 1, 2022; and the

2) Notice of Application for Court Orders to Set Aside Injunction filed by the first and second defendants on December 5, 2022.

[9] The orders sought in the Urgent Ex Parte Notice of Application for Interim Injunction filed December 1, 2022 were:

1. *"That the Defendants or any of them whether by themselves, their servants and/or agents or anyone claiming through them be and are hereby restrained from taking any steps or any further steps to sell, lease, mortgage, transfer or otherwise dispose of the property known as Lime Tree Villa situate at Hermosa Beach, Ocho Rios in the parish of St. Ann and registered at Volume 933 Folio 16 of the Register Book of Titles pending the determination of this matter.*

2. *That there may be such further or other relief as this Honourable Court deems fit."*

The grounds upon which the applicants sought the Orders were as follows: -

i. *"The Claimants and the Defendants are all co-owners of the said property and hold same equally as tenants in common.*

ii. *The Claimants are in the process of filing a claim in this court for orders for sale of the subject property.*

iii. *The Claimants have reason to believe that some of the named Defendants are hurriedly taking steps to sell their share in the property to the current tenants at the property.*

iv. *The said tenants are tenants of all the owners including the claimants.*

v. *The said tenants have not paid rent for in excess of twenty one (21) months and the claimants are in the process of initiating court proceedings against them to recover the arrears of rental, to recover possession of the property from them and for other breaches of their tenants' obligations.*

vi. *The Claimants wish to be given a reasonable right of first refusal to purchase and or the first option to purchase the share of any of the Defendant(s) who wish to sell his/ their share in the property.*

vii. *The Claimants do not wish to own the property jointly with the tenants who breached and continue to breach the terms of their tenancy.*

viii. *Should the Defendants or any of them sell their shares in the property to the said tenants, the Claimants could not reasonably coexist and cooperate with them as co-owners and to manage the property together for the benefit of all the owners while pursuing a claim against them.*

ix. The Claimants undertake to abide by and pay any damages awarded to the Defendants on account of the granting of these injunctions/ orders."

[10] The orders sought in the Notice of Application for Court Orders to Set Aside Injunction filed December 5, 2022 are:

1. "The interim injunction granted herein against the 1st and 2nd Defendants by Miss Justice A. Nembhard on 1 December 2022 be discharged.

2. The 1st and 2nd Defendants' costs as well as attorneys' costs, on an indemnity basis, incurred from the time of the filing of the Claimants' Notice of Application on 1 December 2022 to its disposal or such other period as this Honourable Court deems fit be paid by Mesdames Judith M. Clarke & Co., Attorneys-at-Law for the Claimants herein, with such costs to be taxed, if not agreed.

3. Costs awarded herein to the 1st and 2nd Defendants to be paid by Mesdames Judith M. Clarke & Co.

4. Alternatively, costs of this application are awarded to the 1st and 2nd Defendants, on an indemnity basis, to be taxed, if not agreed.

5. The 1st and 2nd Defendants' attorneys-at-law to prepare, file and serve the Orders herein."

The grounds on which the Applicants seek the foregoing orders are as follows:

i. The Claimants' claim does not disclose a cause of action known to law and, a fortiori, there are no serious issues to be tried between the Claimants and the 1st and 2nd Defendants.

ii. *The Claimants' failure and/ or refusal to make material disclosure.*

iii. *The Claimants' failure and/ or refusal to give notice of their application as envisioned by the guidelines laid down by the Privy Council in* ***National Commercial Bank Jamaica Limited vs. Olint Corporation Limited*** *[2009] UKPC 16 since there existed no basis for dispensing with such notice.*

iv. *The Claimants' failure and/or refusal to give a proper undertaking, in damages.*

v. *The Claimants' breach of the mandatory requirements of Rule 11.16(3) of the Civil Procedure Rules.*

vi. *The Claimants' Attorneys-at-Law, Mesdames Judith M. Clarke & Co, acted improperly, negligently, or unreasonably in proceeding to apply for injunctive relief against the 1st and 2nd Defendants in circumstances where: they knew or ought to have known there was no cause of action known to law, which is a prerequisite for finding that there are serious issues to be tried between the Claimants and these Defendants; and by virtue of their intimate involvement in the matter since July 2022, they knew that the Claimants had breached their duty to make full and frank disclosure.*

vii. *The granting of the orders is in keeping with the overriding objectives of the Civil Procedure Rules.*

THE ISSUES

[11] Among the issues arising in these applications are the usual considerations in determining whether an injunction should be granted, or in this case, extended or

discharged. These are whether there is a serious issue to be tried, whether damages are an adequate remedy, where does the balance of convenience lie. This includes a consideration of whether the status should be maintained and whether the applicant has given any, or any adequate undertaking as to damages. In addition to those issues, consideration must be given to the questions of whether there was material non - disclosure on the part of the claimants, whether the ex-parte injunction should be discharged on account of the failure of the claimants to give notice of the hearing to the defendants and whether the claimants have satisfied the equitable principle of approaching the court with clean hands. Further, the court must decide if the Claimants were required to comply with the provisions of ***Rule 11.16 (3) of the Civil Procedure Rules***.

THE LAW

[12] The guiding principles which the court must consider in determining whether to grant an injunction was set out in the House of Lords decision of ***American Cyanamid v Ethicon Ltd [1975] AC 396***. These principles have been adopted in our jurisdiction, as reiterated by the Privy Council decision of ***National Commercial Bank v Olint [2009] 1 WLR 1405***.

[13] The court must consider: -

a. Whether there is a serious issue to be tried;

b. Whether damages would be an adequate remedy; and

c. Whether the balance of convenience lies in favour of granting or refusing the injunctive relief that is sought. (per Lord Diplock in ***American Cyanamid***)

[14] Regarding these guiding principles, Lord Diplock in ***American Cyanamid*** expounded at pages 407 to 408. On the question of whether there is a serious issued to be tried, he said:

> ***"…The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.***
>
> *It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing":* ***Wakefield v. Duke of Buccleugh*** *(1865) 12 L.T. 628, 629.* ***So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought****." (emphasis added)*

[15] On the matter of the adequacy of damages he said:

> *"As to that,* ***the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.****" (emphasis added)*

[16] In explaining when the balance of convenience should be considered, His Lordship explained that:

> *"**It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.** It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case." (emphasis added)*

[17] Specifically, with regard to the preservation of the status quo, His Lordship made it plain that:

> *"Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial."*

[18] And the exposition continued thus:

> *"Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies, and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case."*

[19] In the Privy Council decision of ***National Commercial Bank v Olint [2009] 1 WLR 1405***, which emanated from our local courts, Lord Hoffman stated at paragraph 16 that:

> *"…The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in* ***American Cyanamid Co v Ethicon Ltd*** *[1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."*

[20] At paragraph 13, of the judgment, the following observation was made:

> *"…Their Lordships therefore consider that* ***a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the*** *injunction (as in the case of a Mareva or Anton Piller order)* ***or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act.*** *These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."* (my emphasis)

On the matter of an undertaking as to damages, His Lordship went on to state, at paragraph 16, that:

> "…*if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."*

CLAIMANTS' SUBMISSIONS

[21] Regarding the question of whether there is a serious issue to be tried, Counsel, on behalf of the claimant, submitted that the claimants' pleadings raise a serious issue to be tried, as it is asserted that the claimants have the right to seek an order for sale of the property, as conferred upon them by ***section 3 of the Partition Act***.

[22] Counsel also submitted that the right given to request a sale of the property and the power conferred on the Court to order such a sale, is separate and independent from any right conferred upon the Court under ***sections 4 and 5 of the Partition Act***, as was made clear in the cases of ***Pitt v Jones App Cases 651*** and ***Drinkwater v Ratcliffe LR 20 Eq 528***.

[23] Counsel observed that in ***Pitt v Jones***, Lord Blackburn clarified at page 659, 2nd paragraph, that the 4th and 5th sections of the English Act (which is similar in wording to our statute) are not, in substance, provisos to section 3.

[24] The court was then directed to the dictum of Sir G Jessel M.R. in ***Drinkwater***, at page 531 of the judgment**,** where the effect of section 3 of the Act and its application was explained. She referenced a quote which will be reproduced at the appropriate juncture.

[25] Counsel then submitted that as the claimants have the right to request a sale of the property under the Partition Act, there can be no real challenge to the conclusion that their claim gives rise to a serious issue to be tried.

[26] Regarding the balance of convenience, it was Counsel's submission that bearing in mind the dicta in ***NCB v Olint*** and also the affidavit evidence, it is beyond doubt that the balance of convenience favours the continuation of the injunction pending the determination of this matter. It is the assertion of Counsel that the idea of the claimant owning the property alongside the current tenants could cause unworkable outcomes that cannot be addressed by any consideration as to

damages, and that the continuation of the injunction seems likely to cause the least irremediable prejudice to the defendants.

[27] Additionally, Counsel stated that the only prejudice and hardship experienced by the defendants is the loss of their opportunity to sell their interest in the property but that, the very effect of the orders sought by the claimants is to allow for the sale of the first and second defendants' interests in the property. Therefore, the opportunity for sale has not been lost (the opportunity being postponed pending the Court's determination of a sale under the Partition Act) and without the injunction, the first and second defendants will likely sell their interests to the tenants. Counsel also said that damages will not be an adequate remedy in the cause.

[28] Regarding the issue of whether there has been material non-disclosure on the part of the claimants, it is Counsel's submission that there has been no material non-disclosure. Counsel examined the defendants' affidavit evidence, in which the defendants assert that the exhibited email correspondences, which are material to the matter at hand, should have been disclosed by the claimants. Counsel referred to the case of ***JSC Mezhdunarodniv Promyshlenniv Bank v Sergei Viktoravich Pugachev [2014] EWHC 2336 (ch)***, where it was said, inter alia, that the:

> "*duty to make full and frank disclosure in relation to a without notice application is an established principle requiring the applicant to disclose everything* ***that would be material to the case****, in order for the court to determine whether or not to grant the order sought…"* (emphasis added)

[29] It is the claimants' contention that they fulfilled their duty to make full and fair disclosure of all the material facts.

[30] Counsel submitted that regarding the documents exhibited in the second defendant's Affidavit filed on December 7, 2022, 'the degree of legitimate urgency and the time available for the making of inquiries' would not have allowed for detailed disclosure such as in the way provided by the defendants. It was also submitted that some of the exhibits contained in the defendant's affidavit were not

known to the claimants and some do not cover any discussions about purchasing the defendants' interest in the property.

[31] The claimants disclosed that there was "a period of discussions" and Counsel sought to persuade the court that all the email correspondences exhibited in the second defendant's affidavit do is to confirm that there was indeed this period of discussions. It is also the submission that this "period of discussions' is not material to the judge's assessment of the claimant's application and that the emails do not provide any additional information which would have been material for the judge to know in dealing with the application as made, a test enunciated in the case of ***Brink's Mak Ltd v Elcombe [1988] 1 WLR 1350***.

[32] Counsel further disclosed that even if the Court were to find that there was some material non-disclosure on the part of the claimants, this should not result in the injunction being discharged or not granted afresh, as their omission, if any, did not leave the court with a "false impression" as it relates to the assessment of the application for the injunction.

[33] Regarding the failure of the claimants to give notice of the application as envisioned by ***NCB v Olint***, Counsel submitted that all the defendants were notified via email prior to the hearing, based on an indication from the Supreme Court Civil Registry that the judge would not entertain the matter unless there was some notification sent to the defendants. Therefore, they contend that there was no breach of the rules regarding no notice of the hearing.

[34] Counsel for the claimants further submitted that ***NCB v Olint*** is not the authority for any assertion that notice must be given of the hearing, hat that case refers to ***Rule 17.4 of the CPR*** as the guiding paragraph, and that rule was complied with in the instant case.

[35] Counsel claimed that "*in the same way that the appellate court is very reluctant to disturb the exercise of a judge's discretion unless it is shown to be plainly wrong, this court certainly has no basis or jurisdiction, without more, to discharge the*

injunction on the basis that the judge who granted the order ex-parte exercised her discretion wrongly. In fact, to do so retrospectively would be to exercise appellate jurisdiction over the decision of the judge of concurrent jurisdiction."

[36] Regarding the failure and/or refusal of the claimants to give a proper undertaking in damages, Counsel for the claimants submitted that the claimants have given a proper undertaking at paragraph 19 of the Affidavit of Michael Bonini filed December 1, 2022. Counsel referred to ***Allen v Jambo Holdings Limited [1979] EWCA J0720-1***, where the court granted an injunction to a widow whose undertaking would have been worth nothing as she was legally aided, and it would not be supported by any proof of means whatsoever. Counsel urged that injunctive relief is not a rich man's charter.

[37] Regarding the claimants' alleged breach of ***Rule 11.16 (3) of the Civil Procedure Rules***, Counsel submitted that ***CPR Rule 11.16*** is not appropriate to the procedural scheme set up for the application for and granting of interim injunctions. Counsel referred to ***Bupa Insurance Ltd v Roger Hunter [2017] JMCA Civ 3***, where the Court considered non-compliance with respect to the same ***CPR Rule 11.16 (3)***. The Court concluded that ***Rule 26.9*** was applicable and the non-compliance with ***CPR Rules 11.15*** and ***11.16 (3)*** could not invalidate the proceedings or order made such that the order should be set aside.

[38] Lastly, Counsel for the claimants urged the Court to grant the injunction sought and refuse the orders by the first and second defendants.

DEFENDANTS' SUBMISSIONS

[39] Counsel for the defendants began their submissions by presenting their application to set aside the injunction and saying that it has since restrained the defendants from selling, leasing, mortgaging, transferring or otherwise disposing of the property in question, pending the determination of this matter.

[40] Counsel highlighted the following evidence of the defendants:

- Since May 2019, the claimants and the first and second defendants have been in discussions regarding the first and second defendants' desire to sell their interest in the property to the claimants.

- The conclusion of the negotiations has been delayed over the years by the claimants' attempts to obtain mortgage financing, that regarding disagreement over the value of the property, and ultimately the price for acquiring the first and second defendants' interests in the property.

- That on November 24, 2022, the claimants communicated their willingness to offer US$400,000.00 for the first and second defendants' interest in the property, but requested an extension until December 7, 2022 to facilitate mortgage discussions. That a Letter of Intent was sent by Counsel for the defendants to the claimants, for the claimants' consideration and the defendants also requested a good faith payment of 5% of the purchase price. The claimants took issue with the good faith payment but indicated their willingness to sign the Letter of Intent.

- The claimants' willingness to sign the said letter of intent was communicated on December 1, 2022 and later that same day, the claimants served the first and second defendants with an Ex Parte Notice of Application for Interim Injunction filed that date. The first and second defendants were not alerted to the date or time of the hearing but later received the Order granting the interim injunction.

[41] Counsel for the defendants observed that the basis for the grant of an injunction lies in ***section 49 of the Judicature (Supreme Court) Act***, where the rules of equity are given pre-eminence and they specifically referred to ***subsection (h)*** which speaks to the fact that an injunction by an interlocutory order of the Court may be granted if the Court thinks fit. Counsel then referred to ***Rule 17.1 (1)(a) of the Civil Procedure Rules*** which allows the Court to grant interim remedies including an interim injunction. Reference was then made to the principles

established in the cases of ***American Cyanamid Co v Ethicon Limited and National Commercial Bank v Olint***, Counsel placed emphasis on their lordships' pronouncement that any notice is better than none when dealing with cases in which there was no time to give the period of notice as is required by the Civil Procedure Rules.

[42] In relation to the issue of material non-disclosure, Counsel referred to the case of ***Venus Investments Limited v Wayne Ann Holding Limited (2015) JMCC Comm 9***, where Sykes J (as he then was) concluded that the obligation of full and fair disclosure had not been met.

[43] In positing that the injunction should not have been granted as there is no serious issue to be tried, Counsel submitted that the claimants' application does not disclose a cause of action known to law. Counsel submitted that there is no obligation for one tenant-in-common to sell his share to another. Where the co-tenants cannot agree on disposal of interests, the proper course of action is to apply for partition or an order for sale. Counsel however noted that, even with the Court's intervention, the Court cannot compel a part owner to sell his share to the other part owner, as was held in the Trinidadian High Court decision of ***Superville v Superville (1999) High Court, Trinidad and Tobago, No. 57607 of 1999 (unreported)***. Counsel also cited an excerpt from the House of Lords decision of ***Pitt v Jones*** which explained the principles codified by the Partition Act.

[44] Counsel insisted that based on the abovementioned authority, it is the party requesting the sale who volunteers his share of the property and the remaining co-tenants who undertake to purchase, if they are interested. Further, that in the case at hand, the claimants seek to do the opposite by forcing the defendants to sell their interest to them and that this remedy is not supported by law.

[45] Counsel further submitted that, the claimants are without a serious issue to be tried as their claim is improperly founded and furthermore, that the Court is without jurisdiction to make an order granting them a right of first refusal over these defendants or any of the defendant' interests in the property.

[46] Counsel urged the court to agree that the injunction should never have been granted to the claimants, as the claimants do not have a right to compel a sale of the first and second defendants' shares in the property to the claimants. Therefore, the question as to the adequacy of damages and the balance of convenience would not then arise.

[47] Regarding the balance of convenience, Counsel urged that in the event the Court finds that there is a serious issue to be tried, the balance of convenience lies starkly in favour of the defendants. Counsel relied on the evidence of Ashley Clarke contained in her affidavit filed December 16, 2022, which speaks to the defendants' risk of suffering further prejudice and hardship, as the tenant's cash offer to purchase the defendants' interests in the property is set to expire January 1, 2023. Accordingly, it was advanced, if the injunction is not discharged and the tenants' offer expires, the defendants would lose yet another opportunity to dispose of their interests.

[48] Regarding the failure to give notice of the application, Counsel submitted that contrary to ***CPR Rule 17.4(4)*** and the principles in ***NCB v Olint,*** the claimants failed to give notice of their application to the defendants, in circumstances that could not be deemed so rare and urgent so as to warrant no notice at all. Counsel referred to the evidence of Antonio Fantappie in his affidavit to the effect that the defendants were served with the Notice of Application on December 1, 2022, at 3:38pm and that this was despite the hearing of the application being set for 4pm on that same day.

[49] Regarding the issue of material non-disclosure, Counsel submitted that the claimants, by filing an affidavit in response to the defendants' Affidavit, have conceded the defendants' assertion that they failed to disclose information material to the matter. The defendants submit that the Affidavit in support of the ex parte application that was filed by the claimants failed "*to provide the Court with the full context which would have enabled a proper consideration of the circumstances*

and depicted the 1st and 2nd Defendants as anything but unreasonable as well as to show that the Claimants' "without" notice application was anything but urgent."

[50] Counsel further submitted that the claimants conveniently omitted the emails dating from as far back as 2019, in relation to the parties' discussion concerning the sale.

[51] Counsel referred to ***Venus Investments Limited v Wayne Ann Holdings Limited***, which emphasized that materiality is an assessment for the Court to make and that:

> *"Claimants' duty was simply to put all the relevant facts before the Court, especially in circumstances where the Defendants were deprived of the opportunity to make representations at the hearing…in the absence of this evidence as to the several years of negotiations, it is unsurprising that the Court was misled into thinking that the claimants were being deprived of a reasonable opportunity to purchase the Defendants' interests…"*

[52] Counsel submitted that the claimants have not approached the court with "clean hands". As detailed on the Affidavit of Ashley Clarke filed December 16, 2022, the claimants have, after obtaining the injunction, proposed an offer to purchase the defendants' shares and asked to be sent a draft of the Agreement for Sale. Counsel further submits that the claimants' conduct has blatantly contradicted the remedy sought.

[53] Lastly, Counsel asked for the Court to grant the defendants costs of the application to set aside the injunction, as well as on the claimants' inter partes application and that the claimants' interim injunction be discharged.

WHETHER THERE IS A SERIOUS ISSUE TO BE TRIED

[54] The claimants contend that there is a serious issue to be tried. The claim is filed under the Partition Act. The claimants specified during the course of the hearing that ***section 3 of the Act*** is being relied on. ***Sections 2 (2), 3,4 and 5*** are reproduced below:

"2(2) For the purposes of this Act, an action for partition shall include an action for sale and distribution of the proceeds; and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

3. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, ***and may give all necessary and proper consequential directions****.* (emphasis added)

4. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property, and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.

5. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party interested in the property to which the suit relates request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given, the Court may order a valuation of the share of the party requesting a sale in such manner as the court thinks fit, and may give all necessary and proper consequential directions."

[55] The defendants contend that the claimants have sought to conflate the provisions of sections 3 and 5 by asking for consequential orders that would reflect the orders that the Court could make if it is that the defendants had petitioned for an order of sale. Counsel Miss Hamilton also insists that the orders sought at Number 2 onwards, in the Fixed Date Claim Form, are not in the nature of consequential orders contemplated by section 3.

[56] The application of section 3 of the English Act, which is similar to section 3 of our local Act, was explained in ***Drinkwater*** as follows:

> *"The 3rd section gives power to the Court to sell for certain reasons. These reasons are specified in every case but one. The reasons specified are, the nature of the property, the number of parties interested, the absence or disability of some of the parties*…where… a sale of the property and distribution of the proceeds would be more beneficial to the parties interested than a division of the property between or among them. Whenever that happens, and any party interested applies for a sale, the Court may direct a sale*…It is an absolute power of sale on the request of anybody, provided the Court is satisfied that it would be more beneficial for the parties interested than a division."*

[57] It is section 5 which envisages a party being given the option to purchase another party's interest in property in an action for partition, but the section does not offer that option to the party who seeks the order for sale. The claimants reiterate however, that their claim was brought pursuant to section 3 and the request in their Fixed Date Claim Form, for the orders Numbered 2 onwards, are sought in the way of consequential orders. It is not at all unusual for courts to make consequential orders as to who should, for example, be given a first option to purchase when the sale of a property is ordered. This Court need not decide in this application whether such an order would be appropriate in this case. That is really a matter for a trial, which means that that question potentially raises a serious issue to be tried.

[58] The defendants have said that even if the defendants proceed to sell to another, that would not prevent the claimants from proceeding with the Fixed Date Claim Form since in any event, what they are seeking is a sale of the property. All that the claimants would have to do, they insist, is to substitute the new owners as parties to the claim. That point however takes us back to the question of whether the court can, in an application brought pursuant to section 3, make consequential orders such as the claimants seek. In an action under the ***Partition Act***, it is not as of course that the court simply directs a sale of the property; it is open to the court to make consequential orders.

[59] Given that the main purpose of the ***Partition Act*** as explained in ***Pitt v Jones*** was to introduce a new method of partition by providing for the sale of jointly owned

property and the distribution of the proceeds of sale in addition to the existing remedy of division of the property, this court is somewhat doubtful that in the ordinary course of things, the parties who are requesting the partition may be given the option to purchase but it is clearly not a foregone conclusion that it would not be open to a court to make such orders via the consequential route, especially given the family connection to the property in question and the potentially untenable situation with the present tenants. The circumstances of this case are somewhat unique and the opportunity should be left open for full arguments to be presented on the matter. This court believes that there is a serious issue to be tried.

[60] The defendants also contend that the purpose of the injunction as it stands is to preserve to the claimants a right that they do not possess in law. They insist that the injunction, if granted, will stymie the defendants in their right to sell property owned by them as tenants-in-common in circumstances where we are operating in a free market economy and there is no law which prevents a joint owner from divesting himself of his interest in property by way of a sale.

[61] If granted, the injunction will operate to delay and not completely obliterate that right to sell. It is clear that the consequential orders are not orders to which a claimant is entitled as of right in an action for partition. However, ultimately, it is within the discretion of the court to grant those orders if the court sees it fit. To not grant the injunction would permanently deny the claimant the opportunity to ever be able to pursue those orders.

WHETHER DAMAGES WOULD BE AN ADEQUATE REMEDY

[62] The defendants say that the question of the adequacy of damages does not feature in the instant case; it is more a question of the balance of convenience. The claimants have asked the Court to have regard to paragraphs 8, 9 and 15 of the affidavit of Michael Bonini filed December 1, 2022, and paragraphs 27 to 30 of Mr. Bonini's Affidavit filed December 14, 2022, in considering the issue. The claimants, through Michael Bonini, state that they have no interest in selling their share of the

property. They allude to the fact of the tenants remaining in the property, are not paying rent and are complaining that the property is not habitable. They reiterate their desire to own the property and not to co-own with the present tenants while having to pursue a separate claim against them. It is fair to say that based on the claimants' expressed interest in retaining their shares in the property and not to become co-owners with the tenants, damages would not for them be an adequate remedy. This court takes the view that the cross-undertaking in damages would provide the defendants with an adequate remedy if it turns out that their freedom to dispose of their interest in the property should not have been restrained That is a matter which favours the grant of the injunction.

[63] Having decided that there is a serious issue to be tried and that damages would not be an adequate remedy for the claimants, I will nevertheless go on to consider the balance of convenience before moving to the decisive question of whether there was material non - disclosure on the part of the claimants.

THE BALANCE OF CONVENIENCE

[64] The claimants emphasize the dreaded prospect of becoming co-owners of the property with the present tenants if the injunction is not granted and the defendants proceed with the sale of their interest in the property to the tenants. The defendants have asked the court to consider that they are missing out on an opportunity to sell their interest in the property. Further, there is a January 1, 2023, deadline to meet, as stated in the Affidavit of Ashley Clarke filed December 16, 2022. That deadline is now academic.

[65] In this instance, the disadvantage to the claimants if the injunction were to be refused, is not compensatable by an award of damages. On the other hand, it would appear that the defendants are being kept out of the monies that they would derive from a sale of the property. In the event the defendants should succeed at trial, that disadvantage of retaining ownership of the property at a time when they wish to sell is in my view compensatable by an award of damages. This is a factor that dictates that the balance of convenience lies in favour of extending the ex

parte injunction. Ultimately, I am of the view that the continuation of the injunction seems likely to cause the least irremediable prejudice to the defendants.

PRESERVING THE STATUS QUO

[66] The concept of the status quo was explained in ***Garden Cottage Foods Limited v. Milk Marketing Board [1984] 1 A.C. 130*** (See paragraph 45 of ***Ralph Williams V Commissioner of Lands).*** The status quo was explained as *"generally being the state of affairs existing during the period immediately preceding the issue of the claim seeking a permanent injunction*".

[67] In this case, we are concerned with a temporary injunction but that does not change the meaning of the term or its applicability. The claimants are seeking to preserve until the trial of the claim, ownership of the property in question by members of one family, all first cousins, albeit there is discord among some members of that group. They are seeking to prevent the transfer of the property to a third party, with whom they do not wish to co-own the property. Should the status quo be disturbed, the injunction would be worthless.

UNDERTAKING AS TO DAMAGES

[68] In ***TPL Limited v Thermo-Plastics (Jamaica) Limited [2014] JMCA Civ 50***, the Court examined, inter alia, (i) the impact of the person seeking the injunction failing to give an undertaking as to damages and present evidence of an ability to meet same and (ii) the effect of a learned judge's order that the injunction be given upon the claimant giving the usual undertaking as to damages. Mangatal JA Ag said:

> *"The proper usual practice and law is, and has been, to require evidence both of a willingness and an ability to provide a proper undertaking as to damages. It would be quite impossible to carry out the balancing exercise required by the court as referred to in* ***American Cyanamid Co v Ethicon*** *and more recently in* ***NCB v Olint*** *and to arrive at a proper assessment of which course is likely to cause the least irremediable prejudice without requiring some substantiation of an applicant's posture and capacity to pay damages in the event that they are required to do so. Indeed, the practice has been particularly so in relation to companies, and commercial matters. Some authorities even go so far as to suggest that where a company is concerned, financial statements, records or accounts should be placed*

before the court in order that the court can properly assess the adequacy of the remedy of damages to the defendant and the claimant's financial ability to pay them. It is trite that courts act on evidence and not bare assertions."

[69] One of the grounds on which the defendants brought the application to set aside the injunction is the alleged failure and/or refusal of the claimants to give a proper undertaking, in damages.

[70] In their submissions, the claimants say that the failure and/or refusal to give a proper undertaking in damages would not be a bar to the grant of an injunction. They rely on the case of ***Allen v Jambo Holdings Limited (supra)***. As the court has found that there was not a failure to give an undertaking in the current matter, there is no need for an in-depth discussion of this case. Suffice it to say that the claimants might have had a difficulty had the court found that there was in fact a failure to give an undertaking.

[71] In paragraph 19 of his December 1, 2022, affidavit, Michael Bonini for himself and on behalf of the second claimant, stated that he undertook to pay to the defendants any damages awarded to them on account of the granting of the injunction. He also stated that he is a financial assistant employed to TD Bank and earn in excess of $US350,000.00 annually.

[72] The court finds the evidence sufficient in proof of his means. Further, the application concerns property located within the jurisdiction of this court and in respect of which the Court could make orders if it becomes necessary in relation to the claimants' share therein to satisfy the undertaking.

MATERIAL NON-DISCLOSURE

[73] In ***Venus Investments Limited v Wayne Ann Holding Limited (supra)***, it was emphasized that materiality is an assessment for the Court to make. In that case Sykes J (as he then was) referred to a passage from the judgement of Viscount Reading CJ sitting in the Divisional Court in ***R v Kensington Commissioners [1971] KB 486***, 495-496:

> "*Before I proceed to deal with the facts I desire to say this:* ***Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits.*** *This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit. (my emphasis)*"

[74] Sykes J went on to say at paragraph 9:

> *"****In other words, once an allegation of material non-disclosure has been made then the actual merits of the case recedes into the background. The task of the court then is to see whether the allegation has been made out and if made out what should be the response****." (my emphasis)*

[75] The learned judge then, at paragraph 12, referred to ***Kensington Commissioners*** where it was held by Scrutton LJ at pages 513-514:

> *"Now that rule giving a day to the Commissioners to show cause was obtained upon an ex parte application; and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts - facts, not law. He must not misstate the law if he can help it - the Court is supposed to know the law. But it knows nothing about the facts, and* ***the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement. This rule applies in various classes of procedure****." (my emphasis)"*

[76] Sykes J continued at paragraph 13:

> *In that same case, Lord Cozens Hardy MR stated at pages 504-505,*
>
> *The authorities in the books are so strong and so numerous that I only propose to mention one which has been referred to here, a case of high authority,* ***Dalglish v. Jarvie****, which was decided by Lord Langdale and Rolfe B. The head-note, which I think states the rule quite accurately, is this:* ***"It is***

> ***the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward."*** *Then there is an observation in the course of the argument by Lord Langdale:* ***"It is quite clear that every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved."*** *That is to say he would not decide upon the merits, but said that if an applicant does not act with uberrima fides and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application. Then there is a passage in Lord Langdale's judgment which is referred to in the head-note. It is this: "There is, therefore, a question of law, whether having regard to the facts thus appearing, the plaintiffs are entitled to the protection they ask; and there is also a question of practice, whether the facts stated in the answer being material to the determination of the question, and being within the knowledge of the plaintiffs by whom the case was brought forward, and who obtained an ex parte injunction upon their own statement, whether the omission of the statement of these facts in the bill does not constitute a reason why the ex parte injunction so obtained should be dissolved." They held that the injunction ought not to be granted although there might be materials apart from this question upon which the injunction might have been granted. Rolfe B. says this: "I have nothing to add to what Lord Langdale has said upon the general merits of the case; but upon one point it seems to me proper to add thus much, namely, that* ***the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the utmost degree of good faith, 'uberrima fides.'*** *In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material it is a fraud; but, besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. So here,* ***if the party applying for a special injunction, abstains from stating facts which the Court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the Court to grant. I think, therefore, that the injunction must fall to the ground."*** *That is merely one and perhaps rather a weighty authority in favour of the general proposition which I think has been established, that on an ex parte application uberrima fides is required, and unless that can be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say "We will not listen to your application because of what you have done."* (emphasized by Sykes J)

[77] The learned judge further stated at paragraph 19, that in ***Jamculture Ltd v Black River Upper Morass Development Co Ltd (1989) 26 JLR 244***, the Court of Appeal emphasised that the duty of full disclosure is not met even though the

material was placed before the judge but was done in such a manner that its true import was not brought home to the judge.

[78] The claimants summed up all that transpired, in the way of prior discussions and negotiations, in paragraphs 12 and 13 of the affidavit of Michael Bonini sworn to on December 1, 2022, on behalf of himself and his brother Francesco Bonini:

> *"Following a period of discussions, we have indicated to the 1st and 2nd defendants that we are desirous of purchasing their shares in the property and are in the process of trying to advance negotiations with them. We, both by ourselves and through our attorneys and the 1st and 2nd defendants by themselves and through their attorneys have engaged in ongoing negotiations with a view to purchasing the two eights (2/8) interest of the 1st and 2nd defendants.*
>
> *However, they have indicated to us directly and through our attorneys that the said tenants have made them an offer to purchase their shares. As a consequence, they have in recent times, placed very stringent conditions on us to commit to certain terms in very short order, failing which, they will sell their shares to the said tenants who remain indebted to us for arrears of rental which are continuing to accrue.*

[79] The defendants further assert that the claimants failed to disclose that they (the claimants) approached the defendants in July 2022, offering to purchase the defendants' interest, actions which the defendant says is contrary to the suggestion that the claimants have not been afforded a reasonable opportunity to purchase.

[80] In response, the claimants assert that their omission of the details of the abovementioned discussions, in their previous affidavit sworn on December 1, 2022, was not intended to conceal from full disclosure any matter evident on the face of the data exhibited in the affidavit of the second defendant. They believe that the inclusion of the emails containing the negotiations between themselves and the first and second defendants, as well as between the parties' respective attorneys-at-law on their behalf, only serve to support their assertion and not to betray any non-disclosure of material facts on their part.

[81] The claimants also say that their omission to disclose prior out of court discussion was not something which they deemed offensive or material in their approach to the court for an injunction and at all events was never intended to mislead the court

in any way. They say that they have always been considerate to be in the vein of amicable, "without prejudice" correspondence and that in any event, given the urgency of their approach to the court on December 1, 2022, they would not have been able to retrieve and disclose this. The claimants also stated in their Affidavit sworn on December 14, 2022, at paragraph 21, that to the best of their reckoning, their present attorneys became involved in the negotiation on their behalf as and from about July 2022, and was not privy to the prior exchanges between themselves and the first and second defendants.

[82] Regarding the claimant's assertion that their attorneys became involved in the negotiation in July 2022, and was not privy to prior correspondence between the parties, it is instructive to refer to paragraph 24 of the ***Venus Investments Limited*** case, where Sykes J (as he then was) said that:

> *"…the full and fair disclosure rule has to be insisted upon. The protection of the judicial process has to take priority over the risk to counsel that he may, unwittingly, pass on incorrect information to the court* ***or fail to inform the court of information that should have been placed before the judge****."* (my emphasis)

The learned judge continued at paragraph 34, by saying that:

> *"…****a without notice applicant has a duty not only to state what he knows, but also to make reasonable enquiries before the application is made in order to uncover facts that may be material and also advance all reasonable arguments that the affected party may have advanced had he been present. This high duty has nothing to do with whether the applicant is seeking to steal a march on the affected party but rather with the public interest in seeing to it that applicants who are seeking orders adverse to another tell the court the truth, the whole truth and nothing but the truth inclusive of nuances that may tell in favour of the affected party what would not be known just from looking at the printed text.*** *The issue is not how should Venus have been protected but rather whether Venus met its high and demanding obligations on the without notice obligations.* ***It is not enough to be factually accurate. Fairness demands that the full implication of facts particularly those facts in favour of the affected party be brought home to the judge****."* (my emphasis)

[83] Firstly, the court is concerned not with what is within Counsel's knowledge, but with what is within the actual knowledge of the parties and what they ought to have known. It would therefore be no excuse that Counsel became involved in the

negotiations on the client's behalf as at a particular date and was not therefore privy to exchanges, whether between the attorneys or between the claimants and the defendants, that had taken place prior to Counsel's involvement.

[84] The defendants assert that the claimants failed to disclose material information to the Court. They complain that the claimants merely referred in the affidavit sworn to and filed December 1, 2022, to "a period of discussions" but failed to exhibit the various email correspondences referred to in the Bundle of Exhibits which commenced as far back as May 1, 2019.

[85] The assertion that the parties were engaged in years of discussion regarding the sale and purchase of the property must be closely examined. Even though it is accepted that discussions did take place, those discussions could not seriously be considered in the light that Miss Hamilton wishes to have this Court see them. The uncontested evidence is that the claimants and defendants were registered as proprietors of the property on May 30, 2022. This is seen in paragraph 4 of the affidavit of Antonio Fantappie. He said that:

> *"The claimants, the 1st, 3rd, 4th, 5th and 6th Defendants and I were registered on the 30th of May 2022 as the registered proprietors of property comprised in Certificate of Title registered at Volume 933 Folio 16 of the Register Book of Titles in Hermosa Beach, Ocho Rios in the parish of Saint Ann ("Lime Tree Villa" or "the property") pursuant to a devise under the Last Will and Testament of Maureen Dawn Skelly Bonini, deceased, our grandmother."*

[86] The defendants exhibited perhaps scores of pieces of communication via email with a view to saying that the emails contained information which was material to the application and which was not disclosed.

[87] They exhibited emails dating as far back as June 12, 2019, discussing matters having to do with the management and valuation of the property, getting an engineer to assess the structural state of the property, the sale of the interest of some of the tenants-in-common and various other matters having to do with the management and upkeep of the property. It is clear from some of those emails that the claimants had indicated a desire to purchase and the first and second defendants had indicated their desire to sell their interest in the property. Exhibited

at Tab F of the bundle, is an email sent on December 7, 2021, from the first defendant to the first claimant but stating that it was from both defendants referencing the defendants' desire to sell and alleging lack of cooperation on the first claimant's part.

[88] Those discussions of course made evident the defendants' desire not to retain their interest in that property, if and when that interest materialized and the claimants' interest to purchase same in that eventuality. It is not as of course that real property devised will devolve upon named beneficiaries in the form of real property. The significance of that evidence also, is that the claimants and the first and second defendants would have had time to consider matters such as the price at which the property would be sold and how matters having to do with the state of the property would have impacted the sale price.

[89] In submissions, the claimants' attorney has alluded to evidence contained in the Affidavit of Michael Bonini sworn to and filed on December 14, 2022, in responding to the defendants' submission that there was material non-disclosure. It goes without saying, that evidence provided after the grant of the ex parte injunction cannot be considered as satisfying any requirement for disclosure in the ex parte application. See paragraphs 37 and 38 of claimants' written submissions. The matters directly relevant to the negotiations to sell and to purchase the disputed property, would have occurred from July 19, 2022, onwards since there could have been no sale or purchase of anyone's interest prior to that time.

[90] Starting at Tabs G (August 9, 2022), H (July 30, 2022) and I (August 9, 2022) there are emails passing between both the defendants' and the claimants' present attorney mentioning the defendants' desire to sell and indicating the names of the attorneys who would act on their behalf. At Tab J, is an email from attorneys indicating they act for the defendants and the first defendant confirming the attorney's representation. At the same tab, is an indication from the first defendant that they (the defendants) had other offers but would use those offers as a

benchmark re the market value of the property. There is also an email from Ms Clarke (July 19, 2022), indicating that she was representing the claimants.

[91] At Tab K (August 29, 2022), Counsel Miss Clarke sent information in relation to her clients, necessary in drafting an agreement for sale. At Tab L, the defendants' attorneys acknowledged receipt. There is communication regarding price with the defendants' attorney. She indicated that her clients were not accepting the price the claimants were offering to pay. At Tab N, there is a further email re price from the defendants' attorney. Again at Tab P, is communication re price between the attorneys.

[92] At Tab Q, is an email from Counsel Miss Clarke to the defendants' attorney taking issue with a valuation report provided by the defendants. At Tab S (September 18, 2022) the defendants' attorneys discussed price and valuation and referenced the offer of the current tenants to purchase. At Tab T, October 18, 2022) the defendants' attorneys suggested two valuators. At Tab U (November 4, 2022) the defendants' attorney expressed her clients' concerns that the negotiations had been protracted and their eagerness to sell, as well as indicating that the defendants had received offers on the open market and are willing to accept. At Tab V, is a document from a Jack Brockway (one of the current tenants) embodying an offer to purchase the disputed property. At Tab W (November 20, 2022) communication from the defendants to the claimants indicating that they have received an offer to purchase their interest and that they are seriously considering the offer. It was also indicated that the sale price is $US400,000.00. The second defendant was the writer and he stated that they would be proceeding to sell their interest to an interested purchaser if there was no response by November 23, 2022 1800 CET. The CET appears to be an indication of time.

[93] At Tab X, (November 23, 2022) is an email from the defendants' attorney at law reaffirming that the sale price was a non-negotiable $US400,000.00 and that it should be communicated that same day whether the claimants accepted. Also at Tab X, is an offer by the claimants to purchase, in the amount of $US340,000.00.

[94] At Tab Y (November 24, 2022) 8:20 pm is an email from the defendants' attorney at law indicating that the defendants are willing to grant the claimants an extension of time until December 7, at 1600 CET, after which they would be proceeding with the sale to a purchaser from whom an offer had been received. Also at Y, email from Counsel Ms Clarke that the claimants were willing to consider the non-negotiable position (evidently a reference to the price), but that their acceptance would be contingent upon results of consultation with prospective lenders.

[95] At Tab Z (November 28, 2022) is a draft letter of intent for claimants to sign. The extension until December 7, would be conditional on the claimants signing this draft letter and making a 5% good faith payment. That payment would be applied to the purchase price. At Tab AA, (November 29, 2022) is an email from the defendants' attorney requesting a response from the claimants.

[96] At Tab BB (November 30, 2022), Counsel Ms Clarke indicated at 10:42 am that certain conditions in the letter of intent were stringent and that the timeline given to them was short. Then at 12.19pm that the claimants are not averse to signing the letter of intent but were opposed to the payment of monies pre contract. At 9:25 pm November 30, 2022, Counsel Ms Clarke indicated she was still awaiting a response from her clients.

[97] Thursday December 1, 2022 at 1:12 pm, Counsel Ms Clarke indicated that the second claimant was at work and would not be available for the rest of the day. Of course the claim was filed December 1, 2022 at 2:04 pm.

[98] I have outlined the sequence of emails for two purposes. Having perused them, firstly, it may quite fairly be said that what the contents of the emails reflect is that there had been a period of discussions as the claimants said. As to whether there were details that could have been mentioned, or should have been mentioned, that will be assessed.

[99] This court has to decide whether there was information that was important for the court to know in order to fairly deal with the ex parte application. It is important to

emphasize that it is not every omission that will cause the court to decide that the injunction should be automatically discharged. Counsel Miss Hamilton says that if all the material facts were disclosed, the court would have been aware that the application was anything but urgent and the defendants were anything but unreasonable.

[100] It is noted that the emails dated November 29, 30 and December 1, were also exhibited by the claimants to the December 1, 2022, affidavit. It was not in my view necessary to exhibit the emails evidencing protracted discussions about the proposed sale and purchase of the property. I believe that most of what is contained in the emails is summed up by the evidence contained in paragraphs 12, 13 and 14 of the affidavit of Antonio Fantappie filed in support of the application and the Fixed Date Claim Form. It is true that the claimants did not point out in the affidavit that the major obstacle between them and the defendants was the question of price and that the claimants were initially making offers in sums lower than the defendants were willing to accept. The question of price at the very end seemed no longer to have been the issue.

[101] The claimants' assertion in the Affidavit of Michael Bonini was that in recent times, the defendants had placed very stringent conditions on them to commit to certain terms in very short order. They also did not point out in a direct manner that the negotiations had gone on in earnest since the time they each acquired ownership of the property in July 2022. Again that fact may be garnered from Miss Clarke's email of July 19, 2022, which is exhibited to the affidavit of December 1, 2022. But reference to "recent times" was to me a clear indication that the discussions were in progress for a more extended period. The evidence from the defendants disclosed that on November 24, 2022, the claimants indicated their willingness to offer US$400,000.00 and requested an extension until December 7, 2022, to arrange for mortgage. The draft Letter of Intent and the request for a good faith payment of 5% of the purchase price were communicated November 29. The claimants simply did not give the precise timeline in the body of the affidavit (the letter explaining the terms and contents was exhibited by the claimants) but it

certainly was not inaccurate to have expressed the timeline as they did; that is by saying in “very short order”.

[102] I do not believe that any omission was so material as to cause this court to say that the injunction is to be discharged on that basis.

[103] The defendants’ attorney has said that the claimants based their urgency of the matter on the defendants’ purported intention to complete a sale on December 1, 2022, and that there is no proof of this assertion.

[104] On the question of whether a false impression was given as to the urgency of the matter, the defendants had made it clear that they were prepared to grant an extension of time until December 7, but doing so, would be conditional on the claimants indicating a willingness to pay the asking price and signing the draft letter and making a 5% good faith payment. The claimant’s position was clearly that they were not willing to make a pre contract payment but their attorney on their behalf indicated their willingness to sign the Letter of Intent.

[105] The claimants must therefore have anticipated that the defendants had no basis on which to grant the extension until December 7, if they were not willing to comply with the defendants’ dictates.

[106] At paragraph 31 of his affidavit filed December 14, Michael Bonini stated that the matter became one of urgency when on November 30, 2022, the attorney for the first and second defendants intimated that further negotiations would be contingent on the execution of the letter of intent. He said further that by an email of November 29, the attorneys for the defendants signalled that they wished to have the letter of intent finalized by Thursday. Further, that in response to his attorney’s request for the extension until December 7, to respond to the demands of the first and second defendants, the response was that the good faith payment was a necessary prerequisite. Although this court clearly could not consider this evidence as satisfying the requirement for disclosure, a perusal of the emails exhibited to the

December 1 2022 affidavit reveals that this information was made available to the court.

[107] Admittedly, the information was not made available in the most desirable format and parties must be mindful of the warning from the Court of Appeal in ***Jamculture Ltd v Black River Upper Morass Development Co Ltd (supra)*** that the duty of full disclosure is not met even though the material was placed before the judge but was done in such a manner that its true import was not brought home to the judge. As to whether the true import of the contents of that or any other email was brought home to the learned judge hearing the application, I will only say that it is the duty of a judge to carefully scrutinize all material placed before her although admittedly, that task may sometimes prove rather tedious and onerous.

[108] What is noticeable, is that there was a flurry of emails between the parties from November 24 to December 1, 2022. What was also impressed upon the claimants is that the defendants were in receipt of a cash offer with a 45 days' completion time.

[109] I note that November 29, 2022 fell on a Tuesday. That meant that December 1, 2022 was the Thursday. There was, from this evidence, a basis for anticipating that December 1, 2022 was the deadline. From the surrounding circumstances, it was not unreasonable for the claimants to genuinely form the view that the defendants intended to dispose of their interest in the property by December 1, 2022. That position cannot be considered as farfetched.

[110] The claimants did not disclose by direct affidavit evidence that their willingness to sign the letter of intent was communicated on November 30, 2022, the day before the application for the injunction was filed, but that is evident from MB4 exhibited to the affidavit of December 1. However, that indication of willingness was one of two conditions that the defendants imposed. The claimants' apprehension is understandable in a context where the defendants had indicated their intention to accept the offer from the tenant. They were willing to comply with one of two

stipulations. It was not unreasonable for them to consider that they would perhaps not be able to rely on the promised extension until the 7th of December.

[111] Further, the defendants themselves said that the tenant's cash offer to purchase the defendants' interests in the property was set to expire January 1, 2023, a mere 31 days later. Thus even in the absence of clear evidence from the claimants regarding an impending sale, this was clearly not a bald assertion without any basis rooted in fact. For this same reason, it cannot be said that the application was not urgent.

GIVING OF NOTICE

[112] Much of the discussion above is relevant to this point. This court accepts that the giving of notice at or about 3:38 pm via email without inserting the time of the hearing is tantamount to giving no notice at all of the hearing. It cannot be said in this instance that no notice was possible. Counsel Miss Clarke had been in contact via email earlier the same day with counsel for the defendants regarding the negotiations. Surely, she must have known by then and must have commenced taking steps to file the application for the injunction. I would only add that since the defendants had indicated the readiness of the tenant to purchase, the claimants must have apprehended an immediate signing of an agreement for sale if notice were to be given.

[113] As the claimants acknowledged, it was only upon the intervention of personnel in the registry who indicated that a judge might be unwilling to hear the application without some form of notice being given that contact was made with the defendants prior to the hearing. It has not escaped notice that the application was heard on the same day that it was filed. As was contemplated in ***NCB v Olint***, there may be situations in which the giving of notice might enable a defendant to take steps to defeat the purpose of the injunction. Their Lordships also acknowledged the fact that such scenario was anticipated in ***Rule 17.4 (4) of the Civil Procedure Rules***. It is beyond argument that had the defendants signed an agreement for sale with

a third party buyer, the purpose of the injunction would have been defeated. That was the very act that the claimants were seeking to enjoin.

CLEAN HANDS

[114] The defendants point to the claimants making overtures to the defendants regarding the purchase of the property after the grant of the ex parte injunction. Miss Ashley Clarke deponed that on December 7, 2022, an email was received from the claimants' attorney at law offering to purchase the defendants' interest in the property for $US375,000.00. The defendants view this behaviour as improper and appalling and sees it as the claimants taking steps to procure a breach of the injunction granted, the terms of which operate to restrain any sale or transfer of the property. While not the most fitting thing to do at the time in all the circumstances, this conduct must be viewed against the background of what the claimants have always to do; that is to purchase the defendants' share in the property. The intent was to prevent a sale to a third party and not to themselves. They perhaps had sought the orders in terms too wide and which in essence has the effect of barring the sale they seek.

FAILURE TO COMPLY WITH RULE 11.16

[115] ***Rule 11.16(3)*** requires an applicant to place in an order made on an application in respect of which no notice was given, a statement telling the respondent of the right to make an application to set aside the order. For the reasons explained by the claimants' attorney at law, I accept the claimant's submission that ***Rule 11.16 (3)*** is not applicable to the present scenario. I say this for the reason that ***Rule 17.2(4)*** states that where no claim has been issued, the application must be made in accordance with the general rules about applications contained in ***Part 11***. In this instance, a claim was issued at the same time as the filing of the application for the ex parte remedy. ***Rule 17.3(2)*** specifically permits the court to grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice.

[116] Further, ***Rule 17.4(5)*** and ***(6)*** explain the procedure to be adopted when an ex parte order is granted. The court is required to fix a date for the further consideration of the application ***(Rule 17.4(5)(a))***, and fix a date on which the injunction or order will terminate unless a further order is made on the further consideration of the application ***(17.4(5)(b))***. The applicant is required to serve the respondent with documents and very importantly, give notice of the date, time and place for further consideration of the application ***(17.4(6)(d))***. There is thus, in my view, no need for a respondent to be notified of any right to make an application to set aside an order which has a maximum life of 28 days ***(Rule 17.4(4)*** and consequently automatically lapses if no further steps are taken. Even if I am wrong in this regard, the failure is not to my mind egregious and cannot operate to invalidate the proceedings based on ***Rule 26.9(2).***

[117] Since the court has decided that the ex-parte injunction is to be extended, that decision renders otiose the defendants' request for an order that the claimants pay costs on an indemnity basis and or that costs to the first and second defendants be paid by Mesdames Judith M. Clarke & Co.

DISPOSITION

[118] The orders sought in the first and second defendants' Notice of Application for Court Orders are refused. The claimants' application for the extension of the injunction succeeds. The ex-parte interim injunction which was granted on December 1, 2022 in the following terms:

> *"The First and Second Defendants or any of them whether by themselves, their servants and/or agents or anyone claiming through them be and are hereby restrained from taking any steps or any further steps to sell, lease, mortgage, transfer or otherwise dispose of the property known as Lime Tree Villa situate at Hermosa Beach, Ocho Rios in the parish of St. Ann and registered at Volume 933 Folio 16 of the Register Book of Titles pending the trial of the claim or further order of the court."*

is extended until the trial of the claim or until further order of this court.

[119] Costs are to be cost in the claim.

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Andrea Pettigrew-Collins
Puisne Judge